

**FILED**

AUG 15 2008

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

1 James T. Walker  
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4 Plaintiff,  
5 JAMES T. WALKER  
in *pro per*

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8 IN THE UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

## 10 CIVIL JURISDICTION

11 JAMES T. WALKER,

Case Number: C07-3100 BZ

12 Plaintiff,

PLAINTIFF'S POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR APPOINTMENT OF  
COUNSEL

13 vs.

14 C &amp; H SUGAR, et. al.,

Date: \_\_\_\_\_  
Time: \_\_\_\_\_  
Court Room: G

15 Defendants.

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## I.

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## FACTS

19 On or about May 2, 2002 Plaintiff suffered injury to a malfunction of equipment (backhoe)  
20 owned and operated by C & H Sugar. Plaintiff was aboard ship at the time of the incident and acting  
21 within the course and scope of his employment as a longshoreman during unloading operations. The  
22 injury consisted of Plaintiff being struck in the head by a malfunctioning backhoe with such force  
23 that the head injury left him totally disable, and temporarily incompetent.

24 The backhoe operator contemporaneously shouted to Plaintiff that the backhoe  
25 "malfunctioned." Plaintiff submits that if true, there is a likelihood that he will succeed on the  
26 merits in this case.

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II.

## **THE COURT HAS DISCRETION TO APPOINT COUNSEL IN A CIVIL CASE**

In a civil action, a plaintiff has no right to appointment of counsel, but a court may appoint counsel at its discretion. U.S. v. \$292,888.04. 54 F.3d 564, 569 (9<sup>th</sup> Cir. 1995). The court has discretionary authority under 28 U.S.C. § 1915(e)(1) formerly 1914(d) to appoint counsel for an indigent to commence, prosecute or defend a civil action. Motions for the appointment of counsel under the above section are addressed to the sound discretion of the court and are granted only in exceptional circumstances. Alexander v. Ramsey, 539 F.2d 25 (9th Cir. 1976); United States v. Madden, 352 F.2d 792 (9th Cir. 1965).

10 A court has discretion to “request an attorney to represent any person unable to afford  
11 counsel.” 28 U.S.C 1915(e)(1) (formerly 1915 (d); Wilborn v. Escalderon 789 F.2d 1328, 1331 (9<sup>th</sup>  
12 Cir. 1986).

13 However, counsel may be appointed only in “exceptional circumstances.” Terrell v. Brewer,  
14 935 F.2d 1015, 1017 (9<sup>th</sup> Cir. 1991).

15 In determining whether to appoint counsel, a court considers various factors such as the  
16 plaintiff's financial need, whether plaintiff has made diligent efforts to secure counsel, the likelihood  
17 of success on the merits, and plaintiff's apparent ability to articulate their claims in light of the  
18 complexity of the issues involved. See e.g., 28 U.S.C. 1915 (e) (1); Agyeman v. Corr.S Corp. of  
19 America, 390 F.3d 1101, 1103 (9<sup>th</sup> Cir. 2004); Wilborn v. Escalderon, *supra*.

20 "A finding of exceptional circumstances requires an evaluation of both the likelihood of  
21 success on the merits and the ability of the petitioner to articulate his claims pro se in light of the  
22 complexity of the legal issues involved. Neither of these factors is dispositive and both must be  
23 viewed together before reaching a decision on request of counsel. *Wilborn*, *supra*

III.

## LIKELIHOOD OF PREVAILING ON THE MERITS OF HIS CLAIMS:

26 The threshold question, therefore, is to determine whether there is a likelihood of prevailing  
27 on the merits of the claims. Wilborn *supra*.

1 Following Plaintiff's blow from a C&H Sugar owned backhoe, the backhoe operator  
2 contemporaneously shouted to Plaintiff that the backhoe "malfunctioned." Plaintiff submits that if  
3 true, there is a likelihood that he will succeed on the merits in this case.

4 **IV.**

5 **PLAINTIFF'S ABILITY TO ARTICULATE HIS CLAIMS**

6 Plaintiff is totally disabled and suffers from, *inter alia*, post-concussion symptoms, including  
7 severe chronic head-aches, ataxia, and memory problems which include short term memory loss  
8 which would likely cause severe problems in conducting a trial.

9 Plaintiff has a minimal education, has a minimal vocabulary, has problems expressing simple  
10 ideas, has grows angry from frustration in stressful social settings such as a trial. Plaintiff requires  
11 medication for pain management which medication, Plaintiff submits, would interfere with anyone's  
12 ability to conduct a trial.

13 It would seem inappropriate to allow C&H Sugar, the entity causing Plaintiff's injuries to  
14 benefit from Plaintiff's deficits.

15 **V.**

16 **PLAINTIFF HAS EXERCISED DILIGENCE IN ATTEMPTING TO HIRE COUNSEL**

17 Plaintiff discussed representation with his current workers compensation attorney who  
18 declined to represent him in a third party tort claim. Plaintiff has interviewed with three potential  
19 attorneys; all declined representation. Plaintiff contacted several other attorneys by telephone; all  
20 declining to represent him in this case.

21 Give the above, Plaintiff submits that he as exercised sufficient diligence to qualify for court  
22 appointed representation.

23 **VI.**

24 **PLAINTIFF IS INDIGENT**

25 As a result of Plaintiff's disability, he is unemployed and receiving social security disability.  
26 He has no wherewithal with which to hire counsel to represent him as to a very valuable property  
27 right; the right to be compensated for a debilitating injury.

1 Plaintiff asks for appointment of a lawyer not just because he has money problems but because  
2 he has diagnosed mental problems. This mental infirmity is confirmed by the lengthy, rambling,  
3 disjointed, and confusing manner in which he has represented himself in Court thus far in the case.  
4 This is further supported by his claim his main source of income is disability for, *inter alia*, a brain  
5 injury. Thus, for him, the issue is very narrow -- should the Court allow an indigent in Plaintiff's  
6 situation to lose a valuable property rights without giving him a lawyer where he is incapable of  
7 defending himself.

8 As the court observed in a unanimous opinion in Massey v. Moore (1954) 348 U.S. 105,  
9 108-109 [99 L.Ed. 135, 138, 75 S.Ct. 145]: "No trial can be fair that leaves the defense to a man who  
10 is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone  
11 before the court. Even the sane layman may have difficulty discovering in a particular case the  
12 defense which the law allows. See Gibbs v. Burke, 337 U.S. 773. Yet problems difficult for him are  
13 impossible for the insane." (See also Wade v. Mayo (1947) 334 U.S. 672, 684 [92 L.Ed. 1647, 1654,  
14 68 S.Ct. 1270], "There are some individuals who, by reason of age, ignorance or mental capacity, are  
15 incapable of representing themselves adequately in a prosecution of a relatively simple nature . . . .  
16 Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law  
17 under the Fourteenth Amendment.")

18 While Plaintiff's situation is not on all fours with the above cases, Plaintiff faces trial as an  
19 unarmed man in the combat zone of Court.

20 This same unanimous court in Massey v. Moore, *supra*, made it clear a litigant need not be  
21 incompetent to stand trial in order to be mentally deficient enough for due process to mandate  
22 appointment of free counsel. "One might not be insane in the sense of being incapable of standing  
23 trial and yet lack the capacity to stand trial without benefit of counsel." (348 U.S. at p. 108 [99 L.Ed.  
24 at p. 138].)

25 It is true Massey v. Moore and like cases arose in the context of criminal proceedings.  
26 Nonetheless, they articulated minimum standards demanded by due process -- a clause which applies  
27 to civil as well as criminal cases -- not the Sixth Amendment which applies only to the latter. If it is  
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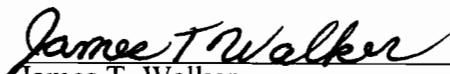
1 not merely difficult but impossible for a mental incompetent to defend himself without counsel in a  
2 criminal prosecution, it is just as impossible for him to do so in a civil case. And, even if due process  
3 eventually can be twisted to somehow tolerate imposing on normal poor people the difficult task of  
4 defending their property rights in the courts without lawyers, it can never be so stripped of meaning as  
5 to foist that task on those for whom it would be an impossibility -- mentally incompetent poor people.  
6 That is tantamount to sanctioning legalized robbery -- using the coercive power of the state to force  
7 defenseless people to surrender their property without a meaningful hearing.

8 **VI.**

9 **CONCLUSION**

10 Given the above, it is clear that Plaintiff's qualifies for appointment of counsel.

11 Date 8-15-08

12   
13 James T. Walker

14 Plaintiff in *pro per*

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